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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 454

SALVATORE TERRITO, CHARLES TERRITO, and VINCENT TERRITO
A Partnership, Trading as Territo & Sons
and
CALTER PETROLEUM CO., INC., A Corporation,
Appellants,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM FINAL ORDER OF THREE JUDGE STATUTORY COURT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Pursuant to Rule 15, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, Appellants Salvatore Territo, et al., are filing this Brief in Opposition to Motion to Affirm and respectfully represent that the questions on which the decision of the cause depends are substantial so as to need further argument.

STATEMENT

This brief is in opposition to the Motion to Affirm the judgment and final order of the United States District Court for the District of New Jersey which was entered on June 6, 1958, in the case of *Salvatore Territo, et al.* v. *United States of America and Interstate Commerce Commission* in Civil Action No. 1134-57. Said Motion to Affirm has been filed in behalf of the United States of America and the Interstate Commerce Commission, appellees, wherein said appellees agree with appellants that this case involves an appeal from the final judgment entered by the three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2285.

The three-judge statutory court did not dismiss the complaint on its merits but entered judgment dismissing the complaint for want of jurisdiction.

The orders dated October 3, 1956 (copies of which are attached as appendices A and B to the Motion to Affirm, pp. 6-9) were entered by Division 1 of the Interstate Commerce Commission, on its own initiative, but without formal complaint, whereby the Commisison instituted two investigation proceedings under Section 204(c) of the Interstate Commerce Act, 49 U.S.C. 304(c), with a view to determining whether appellants have been and are engaging in the transportation of property in interstate or foreign commerce for compensation as a common or contract carrier by motor vehicle, in violation of Section 206(a)(1) or 209 (a)(1) of said Act, and to issuing such orders and taking such other and further action as the facts and circumstances may appear to warrant.

The important question which this Court is requested to decide relates directly to whether the Interstate Commerce Commission, a quasi-judicial body, may institute investigations of private carriers under Section 204(c) of the Interstate Commerce Act on any subject other than qualifications and maximum hours of service of employees, and standards of equipment, in view of the restriction placed upon the Inter-

state Commerce Commission by Congress. The Commission's limited authority over private carriers is expressly set forth in Section 204(a)(3) of the Interstate Commerce Act which is set forth in full at pages 4-5 of our Jurisdictional Statement. At page 7 of the Jurisdictional Statement the statement was made that: "It is further represented to the Court that these questions present substantial issues of law which have not previously been the subject of judicial determination by an appellate court or by the Supreme Court of the United States." The Motion to Affirm does not dispute the above quoted allegation of the appellants but contains references to prior decisions of this Court which do not, in any way, involve the important question as to whether the Interstate Commerce Commission exceeded its statutory authority in instituting the investigations by its orders of October 3, 1956, *supra*.

ARGUMENT

The basic error committed by the three-judge statutory court in its judgment and order entered June 6, 1958, and the basic error which is re-argued by the appellees in their Motion to Affirm may be pinpointed by referring to that portion of the opinion of the three-judge statutory court which reads:

> "It has long been held, both in cases involving the Interstate Commerce Commission and in cases of other administrative agencies, that orders which merely direct that a matter proceed to hearing and administrative decision and do not require a party to take or refrain from taking any substantive action are not reviewable." (Jurisdictional Statement, p. 10).

Except for the decision of the Supreme Court of the United States in the case of *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S., 125, 130-131, the appellees rely upon

the same cases which were relied upon by the three-judge statutory court.

None of the cited cases have any relationship to the direct question raised by this appeal.

Section 204(c) of the Interstate Commerce Act, which is the statute relied upon by the appellees as the authority of the Commission to institute the investigations referred to herein, was not enacted into law until August 9, 1935, which was some 18 years following the May 21, 1917 opinion of the Supreme Court of the United States in the case of *United States* v. *Illinois Central R. Co.*, 244 U.S. 82.

None of the cited cases have any bearing whatsoever on the statutory authority of the Interstate Commerce Commission to institute investigations of private carriers under Secion 204(c), nor do any of the cited cases relate to the extent of the authority vested in the Interstate Commerce Commission under the provisions of said Section 204(c) of the Interstate Commerce Act.

Appellees assert that the Commission has done nothing more than to decide that there is sufficient cause for an investigation and determination of the question whether appellants' operations bring them within the statutory definition of a private carrier or within the statutory definition of a contract or common carrier. Appellees further contend that the orders of October 3, 1956, which were entered by the Commission instituting the above described investigation proceedings are only "notices" and that they do not require appellants to do or refrain from doing anything. Appellees further contend that appellants are merely given notice of the investigation proceedings so that they may, if they desire, participate therein, cross examine witnesses, offer evidence, and be heard generally on the issues. These contentions, which appear on page 3 of Appellees' Motion to Affirm, do not appear at any place in the orders of October 3, 1956, *supra*, which were the orders instituting said investigation proceedings.

It is fair to assume that the appellees' assertions referred to in the preceding paragraph were made as a result of a study of the cases cited in the opinion of the three-judge statutory court and in their Motion to Affirm. All of the cited cases, except the Casale case, were decided by this Court between 1917 and 1938.

A significant development occurred within the Interstate Commerce Commission concerning a respondent's obligation and responsibility in investigation proceedings when the Commission adopted its new set of General Rules of Practice Before The Commission on July 31, 1942, which became effective September 15, 1942. For the first time it adopted Rule 43 and Rule 74 which set forth the obligations and responsibilities of respondents in investigation proceedings. Since September 15, 1942, it has become perfectly clear that an order is required to institute investigations and such order is not to be interpreted as a notice. The 1942 rules require a respondent to open and close the hearing in an investigation proceeding. The examiner may vary the order of presentation but it is not mandatory upon him to do so. (Rule 74). The failure to comply would obviously place the respondent in the position of failing to comply with a rule of practice which was prescribed under authority of Sections 17, 204(a)(6), 205, 304(a) and 403(a) of the Interstate Commerce Act. (U. S. Code, title 49, secs. 17, 304(a)(6), 904a), and 1003(a).). Rules 43 and 74 of the General Rules of Practice of September 15, 1942, now appear as Rules 1.43 and 1.74 in the General Rules of Practice Before the Commission which became effective October 1, 1956, and which are presently in effect with the exception of a minor amendment to Rule 1.74 which became effective on March 1, 1957, namely, — "except at further hearings granted on petition the petitioner requesting further hearing shall open and close.

Each of the above referred to General Rules of Practice Before The Interstate Commerce Commission suggest the desirability, if not the necessity, to review the prior decisions

of this court concerning "orders" v. "notices" as well as the extent of the Commission's statutory authority to institute investigations on its own initiative without complaint.

Appellees appear to have overlooked Rule 1.43 and Rule 1.74 of the General Rules of Practice Before The Interstate Commerce Commission pertaining to investigations which read as follows:

Rule 1.43 "An order instituting an investigation will be served by the Commission upon respondents. If within a time period stated in that order a respondent fails to comply with any requirement specified therein respondent shall be deemed in default and to have waived any further hearing. Thereafter the investigation may be decided without further proceedings."

Rule 1.74 "Witnesses will be orally examined under oath before the officer unless their testimony is taken by deposition or the facts are presented to the Comimssion in the manner provided under modified or shortened procedure. In formal-complaint, application, and investigation proceedings complainant, applicant, and respondent, respectively, shall open and close at the hearing, except at further hearings granted on petition the petitioner requesting further hearing shall open and close. Interveners shall follow the party in whose behalf the intervention is made. The foregoing order of presentation may be varied by the officer, who also shall designate the order of presentation in any other type of proceeding, of any other party to any proceeding, or of parties to several proceedings being heard upon a consolidated record."

It follows, therefor, that the investigation proceedings instituted by the aforesaid orders of October 3, 1956, do place a most serious burden and responsibility upon the respondents who are the appellants herein. The above quoted pro-

visions of the General Rules of Practice Before The Commission are but two examples as to why the decisions cited in the judgment and order of the three-judge statutory court and in appellees' Motion to Affirm may not be considered as precedents upon which to base an opinion on the two substantial questions of law raised by this appeal.

Emphasis is placed by appellees on the decision of this Court in the Illinois Central case, *supra*. However, in the Illinois Central case this Court had before it on appeal a question relating to the Commission's jurisdiction over a further hearing upon the issue of reparation. This is clear from that portion of this Court's opinion which provides:

> "The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion, — in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Proctor & G. Co.* v. *United States*,—one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree." (*United States* v. *Illinois Central R. Co.*, 244 U.S. 82, 89).

In the instant case no hearing has been held.

In its opinion, the three-judge statutory court attempts to rationalize its position with the opinion of the Supreme Court of the United States in *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S. 125, 130-131. Actually the opinion of this Court in the Rochester Telephone case contains a very clear expression of the law which supports our position on the present appeal. Specifically this Court stated, in its opinion, in the Rochester Telephone case as follows:

> "Even when resort to courts can be had to review the Commission's order, the range of issues open to review is narrow. *Only questions affecting* constitutional

> power, *statutory authority* and the basic pre-requisites of truth *can be raised.*" (italics supplied). *Rochester Telephone Corp.* v. *United States*, 1939, 307 U.S. 125, 139-140.

The question affecting the Commission's statutory authority to institute the investigations which is the primary question involved in this appeal was not before this Court for consideration in the Rochester Telephone case, *supra.*

As to the decision of this Court in the case of *Federal Power Commission* v. *Metropolitan Edison Co.*, (1938) 304 U.S. 375, appellees contend that this Court held that the statute authorized review only of "orders of a definitive character dealing with the merits of a proceeding" and did not embrace "mere preliminary or procedural orders." 304 U.S. 384-385. Appellees further quote from the decision of this Court in the Federal Power Commission case, *supra*, as follows:

> "So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. 304 U.S. 375, 385.

Two pertinent distinctions between the Federal Power Commission case, *supra*, and the present appeal are:

1. The order of the Federal Power Commission dated January 6, 1936, which instituted the investigation in that case was not before the court for review. The only matter before the court was a petition of respondents asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. This Court specifically stated:

> "There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review has been made." 304 U.S. 375, 377.

In the present case the orders of the Interstate Commerce Commission dated October 3, 1956, which instituted investigation proceedings, were issued without the requisite statutory authority.

2. This Court stated, in its opinion, in the Federal Power Commission case, *supra*, that:

> "Section 307(c) (of the Federal Power Act) also provides that any person who wilfully fails or refuses to attend and testify, or produce books and papers, in obedience to the subpoena of the Commission, shall be guilty of a misdemeanor and be subject to fine and imprisonment. The qualification that the refusal must be 'wilful' fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled." 304 U.S. 375, 387.

The qualification that refusal to attend a hearing and testify, or produce books and papers, must be "wilful" before a person may be guilty of a misdemeanor does not appear in the subpoena provisions of the Interstate Commerce Act. (See Section 205(d) and Section 12(2) and (3) of the Interstate Commerce Act.)

The Casale case cited by appellees does not involve a question of the Commission's authority to assume jurisdiction over any person or carrier. The latter case involves solely a complaint to set aside an order of the Interstate Commerce Commission which denied a motion of plaintiff for an unconditional dismissal of its grandfather application. The

plaintiff was voluntarily before the Commission as a party in an administrative proceeding and had not exhausted its administrative remedies before appealing to the courts for assistance. (*John J. Casale, Inc.* v. *United States*, 52 F. Supp. 1005, 1006, affirmed, 321 U. S. 752). It is quite clear that the initial question as to the Commission's statutory authority to assume jurisdiction in a particular type of case or investigation proceeding was not before the court in the Casale case. It is directly before this Court in the present appeal.

CONCLUSION

The Interstate Commerce Commission has deprived the Territo family and Calter Petroleum Co., Inc., of the basic rights granted to them by Congress when it restricted the jurisdiction of the Commission over private carriers in Section 204(a)(3) of the Interstate Commerce Act. Section 204(c) of the Interstate Commerce Act does not give the Commission any greater authority over private carriers than the clearly defined authority appearing in Section 204(a)(3) of the Interstate Commerce Act.

For the reasons set forth in our Jurisdictional Statement as supplemented by this Brief in Opposition to Motion to Affirm, it is respectfully submitted that this Court enter an appropriate order noting its jurisdiction of this appeal thereby denying appellee's Motion to Affirm.

Respectfully submitted,

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